Ref.No. 332

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

JAIRO DIAZ, Complainant,	)	
v.	)	8 U.S.C. §1324b Proceeding
	)	Case No. 90200354
CANTEEN CORPORATION, Respondent.	)	

DECISION AND ORDER
(May 22, 1991)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Jairo Diaz, Complainant, pro se.
Marshall B. Babson, Esq. for Respondent.

I. BACKGROUND

This case arises under Section 102 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. §1324b. Jairo Diaz, is an individual of Honduran national origin, authorized to work in the United States. Mr. Diaz (Diaz or Complainant) charges that "Canteen Company" or Canteen Corporation (Canteen or Respondent) unlawfully discriminated against him when it discharged him on or about November 18, 1989 from his position as dishwasher at its service contract location in Boston, Massachusetts. Complainant alleges only discrimination arising out of his national origin status.[1]

II. PROCEDURAL SUMMARY

On January 15, 1991 Diaz filed in the Office of the Chief Administrative Hearing Officer (OCAHO) his Complaint dated January 10, 1991. On March 4, 1991 this Office issued a Notice of Hearing (NOH) which transmitted the Complaint to Respondent. The NOH was served on Respondent March 6, 1991, by certified mail as confirmed by the signed delivery receipt returned to this Office by the U.S. Postal Service. I did not receive either a timely pleading or other response from Respondent within thirty days of its receipt of the Complaint.

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1 In contrast to his charge before the Office of Special Counsel (OSC) where he alleged both national origin and citizenship discrimination, Mr. Diaz does not here allege citizenship based discrimination. In any event, it appears from this record that he is not a "protected individual," as defined by 8 U.S.C. §1324b(a)(3), and would be ineligible to bring such an action.

The allegations of the Complaint, and lack of an Answer by Respondent raised questions of timeliness and jurisdiction. Accordingly, I issued on April 17, 1991 an inquiry to the parties and requested a showing of cause on the part of Respondent for failure to timely file an answer. I also directed Complainant to explain why the charge against Respondent alleging unfair immigration related employment practices was filed with the Office of Special Counsel (OSC) on July 19, 1990, more than 180 days after the last date of the alleged discrimination. 8 U.S.C. §1324b(d)(3). I advised Complainant that I might not be able to proceed with his case unless he provided a basis for equitable relief. Responses by the parties were due not later than May 10, 1991.

In response to the April 17 Order, I received filings from Respondent on May 8, 1991. Those filings included a Motion to Accept Answer Out of Time or To Amend General Denial, an affidavit in support by Chris C. Burch, Labor Relations Manager for Canteen, a proposed Answer, and Motion for Summary Judgment. To date I have not received a filing by Complainant.

III. DISCUSSION AND CONCLUSIONS

A. Response to Order to Show Cause Why Judgment By Default Should Not Issue

Respondent's reply to the show cause order is that the recipient of the Complaint on behalf of Respondent, Mr. Burch, is not an attorney and did not understand that a formal administrative proceeding had been initiated.

In the alternative, Respondent requests that the proposed Answer serve as an amendment to the general denial contained in a March 22, 1991 letter from Burch to Jack Perkins, Chief Administrative Hearing Officer (CAHO). Attached to the Burch affidavit is a copy of that letter.

Burch attests at paragraph 2 of the affidavit that when he received Diaz' Complaint dated January 10, 1991, he did not understand that it was a document which initiated formal proceedings before OCAHO. Burch mistakenly believed that because Respondent had already cooperated fully with OSC, which had advised Canteen that it did not intend to file a Complaint, there was no further action that could be taken by Complainant.

Respondent omits reference, however, to the letter dated November 13, 1990 addressed to Burch from OSC, a copy of which accompanied the filing of the Complaint. That letter recites that "[e]ven though the Office of Special Counsel will not be filing a complaint pursuant to this matter, Mr. Diaz may file his own Section 102 Complaint directly with an administrative law judge. . . ."

Significantly, Burch's affidavit also fails to mention receipt of the NOH issued by Perkins, CAHO, and mailed in a Department of Justice, postage prepaid envelope, which transmitted to Respondent a copy of the Complaint and advised Respondent of its duty to file an answer within thirty days of receipt of the NOH. In claiming surprise that a formal proceeding was underway, Burch fails also to acknowledge receipt of the Rules of Practice and Procedure (Rules) before OCAHO administrative law judges, 28 C.F.R. Part 68, which, as customary practice, are included in the mailings of the Complaint and NOH to Respondent.

In light of these omissions, the credibility of Burch's assertion that he had no knowledge that a formal administrative proceeding had begun is substantially in doubt. Having acknowledged that he addressed a letter to Perkins, CAHO, whose name and address are found only on the NOH, I find that Burch received the NOH, which as a matter of routine was accompanied by the Complaint and the Rules. By receipt of that mailing, Respondent had notice of the initiation of the administrative proceeding. Canteen disregarded the administrative process and the directions contained in the NOH. Its alleged lack of notice is insufficient to satisfy the show cause. The question of default is, however, rendered moot as a result of the treatment accorded by this Decision and Order to the letter addressed by Burch to CAHO on March 22, 1991.

The Burch letter to the CAHO contains, although not very informative, not in the usual form, and not addressed to the judge, a general denial to the allegations of the Complaint.

When I issued the April 17, 1991 order to show cause, I was unaware of the existence of the March 22 letter. That letter was not addressed to me and is not contained in the official docket file. Upon inquiry to the CAHO staff, it appears that OCAHO did in fact receive a letter from Burch. Inexplicably, it was not forwarded to me. Upon consideration of the contents of that letter, I conclude it constitutes a response to the Complaint within the thirty day regulatory time period. As it essentially contained all the elements of an answer under 28 C.F.R. §§68.6 and 68.8(c), I accept the March 22 letter as a timely Answer to the Complaint.

I will treat the proposed Answer by Respondent filed on May 8, 1991 as its Amended Answer to the Complaint.

B. Lack of National Origin Jurisdiction

I do not have jurisdiction to entertain Complainant's charge of national origin discrimination in light of Respondent's response to my inquiry of April 17, 1991. Accordingly, for the reasons stated below, I dismiss the Complaint for lack of jurisdiction.

As an alien authorized for employment in the United States, Complainant is among the class of individuals protected against discharge from employment because of national origin discrimination. Title 8 U.S.C. §1324b makes plain, however, at subsection (a)(2), that administrative law judges are not empowered to adjudicate national origin employment discrimination claims which are within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). IRCA excludes from the definition of an unfair immigration-related employment practice "discrimination because of an individual's national origin if the discrimination . . . is covered under section 703 of the Civil Rights Act of 1964," 8 U.S.C. §1324b(a)(2)(B). That Act, codified at 42 U.S.C. §§2000e et seq., generally covers national origin discrimination by employers of fifteen or more employees, conferring enforcement jurisdiction on EEOC and the district courts.

The logic of the exception is plain. IRCA empowered administrative law judges to adjudicate claims arising out of the enlarged national origin jurisdiction, i.e., of employers with more than three employees and fewer than fifteen. Jurisdiction over national origin discrimination claims established before enactment of IRCA on November 6, 1986 was not to be disturbed. Case law under IRCA has clearly so understood. See e.g., Romo v. Todd Corp., OCAHO Case. No. 87200001 (Aug. 19, 1988), aff'd., United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990); Adatsi v. Citizens & Southern National Bank of Georgia, OCAHO Case No. 89200482 (July 23, 1990), appeal dismissed, Adatsi v. Dep't. of Justice, No. 90-8943, slip op. (11th Cir. February 25, 1991); Martinez v. Lott Constructors, Inc., OCAHO Case No. 90200320 (April 30, 1991); Huang v. United States Postal Service, OCAHO Case No. 91200022 (April 4, 1991); Ryba v. Tempel Steel Co., OCAHO Case No. 90200206 (Jan. 23, 1991); Akinwande v. Erol's, OCAHO Case No. 89200263 (March 23, 1990), and Bethishou v. Ohmite Mfg., OCAHO Case No. 89200175 (Aug. 2, 1989).

Here, Burch's affidavit at paragraph 4 attests that Respondent is an entity which employs more than 30,000 individuals in its food service business in the United States. He also attests that the employment policies and practices of Respondent throughout the United States, including the Boston area, are under the common control of Respondent. Accordingly, I find and conclude that the facility at which Complainant worked, regardless of the specific number of Canteen's employees who worked at that location, is not an entity "which provides separately for the hiring . . . without reference to the practices of, and not under the control of or common control with, another subdivision . . ." of Respondent. 8 U.S.C. §1324b(g)(2)(D). It follows that the Boston facility of Respondent cannot be considered a separate entity for the purpose of establishing jurisdiction. Accordingly, because Respondent

employs more than fourteen individuals, this case is dismissed for lack of national origin jurisdiction.[2]

This Decision and Order is the final administrative order in this case pursuant to 8 U.S.C. §1324b(g)(i). Not later than 60 days after entry, Complainant may appeal this Decision and Order "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business." 8 U.S.C. §1324b(i)(1).

SO ORDERED.

Dated this 22nd day of May, 1991.

Marvin H. Morse
Administrative Law Judge

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2 Complainant failed to respond to my April 17, 1991 Order, and has not replied to Respondent's motion for summary decision. In light of my determination as to national origin jurisdiction, I do not reach the issue whether this case should be dismissed because of an untimely filing of the charge of discrimination before the Office of Special Counsel. See 8 U.S.C. §1324b(d)(3).